



**The Comptroller General  
of the United States**

Washington, D.C. 20548

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## **Decision**

**Matter of:** Kinetic Concepts, Inc.  
**File:** B-232118  
**Date:** October 26, 1988

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### **DIGEST**

Protest of contract award is sustained where the agency awarded the contract after discussions with one of two offerors in the competitive range, and without requesting best and final offers.

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### **DECISION**

Kinetic Concepts, Inc., protests the award of a contract, based on initial proposals, to Mediscus Group under request for proposals (RFP) No. 570-17-88, issued by the Veterans Administration (VA) Medical Center in Fresno, California, for an estimated quantity of 31 air support therapy beds. Kinetic contends that best and final offers (BAFO) should have been requested because conversations held between its firm and the VA constituted discussions, and that the awardee's bed does not comply with the specifications.

We sustain the protest.

The VA agrees with Kinetic that contract award on the basis of initial proposals was improper, not because the VA thinks the conversations with Kinetic constituted discussions, but rather because discussions were conducted with Mediscus. The VA explains that Kinetic and Mediscus, the only offerors responding to the solicitation, both submitted deficient initial proposals which failed to describe how their offered beds conformed to the RFP. According to the agency, instead of asking both firms to furnish the necessary technical information and requesting BAFOs it held negotiations only with Mediscus, the low offeror, by examining the firm's offered bed in the presence of and with the assistance of Mediscus representatives. After determining that the bed complied with the specifications, the VA states, the contract was awarded to Mediscus on June 24, 1988, without requesting BAFOs.

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Under applicable regulations contract award may not be made on the basis of initial offers received if discussions are held with any offeror. Federal Acquisition Regulation (FAR) § 15.610(a)(3) (FAC 84-16). If discussions are held with one offeror, the contracting agency is required to conduct discussions with all other offerors in the competitive range, which is composed of those proposals that, as submitted, either are acceptable or are susceptible of being made acceptable through negotiations. See FAR § 15.610(b). Upon completion of discussions, the agency must request BAFOs from those offerors still in the competitive range. FAR § 15.611(a).

Our understanding of the VA's position on the two initial offers it received is that although they both were unacceptable each could be made acceptable through the submission of technical information, i.e., they were in the competitive range. The agency, however, held discussions only (in the VA's view) with Mediscus, evidently because Mediscus was the lower-cost offeror. In light of this concession, and since no BAFOs were requested--not only would discussions with Kinetic have permitted the firm to cure its offer's deficiencies, but a BAFO request would have given Kinetic the opportunity to lower its initial price--we agree that award to Mediscus on the basis of the firm's explanation of its initial proposal was improper.<sup>1/</sup>

With respect to remedy, the VA states that it did not suspend performance under Mediscus' contract because the agency was not notified of Kinetic's protest until August 3, more than 10 calendar days after the June 24 award. In this respect, the Competition in Contracting Act of 1984 (CICA) requires a contracting agency to suspend contract performance if the agency receives from our Office notice of a protest filing within 10 calendar days of the date of the award. 31 U.S.C. § 3553(d)(1) (Supp. IV 1986); see Bid

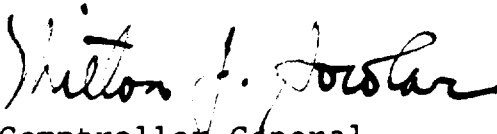
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<sup>1/</sup> The award was improper even if we were to accept Kinetic's characterization of whatever conversations the VA had with it as negotiations, since the fact is that BAFOs were not requested.

Protest Regulations, 4 C.F.R. § 21.4(b) (1988).<sup>2/</sup> The VA suggests that because remedial action under the contract therefore is not practicable (deliveries were completed by September 9), the appropriate remedy for Kinetic is reimbursement for the costs of preparing its proposal in response to the solicitation and of pursuing the protest.

We agree with the VA. The appropriate remedy where an agency fails to conduct discussions with all offerors ordinarily would be for the agency to reopen the competition, hold discussions, request BAFOs, and correct the selection decision if warranted. See United Telecontrol Electronics, Inc., B-230246 et al., June 21, 1988, 88-1 CPD ¶ 590. As the VA explains, that remedy is not practicable here. In these circumstances, the protester is instead entitled to recover its proposal preparation and protest costs. 4 C.F.R. § 21.6(d). Kinetic should submit a claim for such costs directly to the VA. 4 C.F.R. § 21.6(e).

The protest is sustained.

*for*   
Comptroller General  
of the United States

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<sup>2/</sup> Kinetic points out that it filed a protest with the VA within the 10-calendar-day period, and argues that performance therefore should have been suspended at that time. The CICA suspension provision, however, applies only where a protest was filed in the General Accounting Office within the cited time frame. See New Mexico State University, B-230669.2, June 2, 1988, 88-1 CPD ¶ 523.